No. 15400

United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT EMMETT HOYT,
Appellant,

vs.

GENERAL INSURANCE COMPANY OF AMERICA, a corporation,
Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF CASE

This is an appeal from a judgment rendered by Chief Judge Claude McColloch in favor of the appellee, an insurance company, which was sued by appellant, a former employee, to recover alleged unpaid overtime compensation under the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.A., secs. 201-219.

The questions presented to the trial court were, first, whether the appellant's employment fell within the ex-

emption provisions of the Act and, secondly, whether appellant in fact performed overtime work. The trial court held that appellant was in an exempt employment (Tr. 22) and accordingly did not determine the second question.

The appellee is engaged in the general insurance business. Appellant was employed by appellee as a boiler and machinery inspector making inspections in the states of Oregon and Washington.

ARGUMENT

Summary of Argument

(1.) Appellant was employed by appellee as an administrative employee.

(2.) In making the determination as to whether appellant was employed as an administrative employee, the Court must look to the actual work performed. The title given the employment is of little assistance in making this determination.

(3.) The question involved is simply one of fact and the trial court's findings will not be disturbed unless clearly wrong.

(4.) The evidence amply supports the findings of the trial judge.

(5.) The authorities support the finding that appellant was employed as an administrative employee.

(6.) The case of *Mitchell v. Hartford Steamboiler Inspection and Insurance Co.,* infra, is not in point in the case at bar.

(7.) Appellee has followed the instructions of a labor board representative in classifying appellant as an administrative employee and engaged in exempt employment.

ARGUMENT

Appellant correctly states on page 4 of his brief that in the court below appellee contended that the work appellant performed was exempt both as an administrative and as a professional employee. However, the court below did not make a finding to the effect that appellant's primary duty consisted of the performance of work of an advanced type in a field of science or learning customarily acquired by prolonged courses of specialized intellectual instruction and study as required under subdivision (a) of Regulation 541.3 relating to professional employees. Accordingly, appellee does not feel that it can properly advance the contention in this court that appellant was employed as a professional employee.

Therefore, on this appeal appellee will contend only that at the time in question appellant was engaged in exempt work within the meaning of Regulation 541.2 as an administrative employee.

This Regulation provides as follows:

"541.2 Administrative

The term 'employee employed in a bona fide * * * administrative * * * capacity' in section 13 (a) (1) of the act shall mean any employee:

(a) Whose primary duty consists of the performance of office or nonmanual field work directly

related to management policies or general business operations of his employer or his employer's customers; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) (1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the regulations in this subpart), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge, or

(3) Who executes under only general supervision special assignments and tasks; and

(d) Who does not devote more than 20 percent of his hours worked in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (c) of this section; and

(e) Who is compensated for his services on a salary or fee basis at a rate of not less than $75 per week (or $200 per month if employed in Puerto Rico or the Virgin Islands) exclusive of board, lodging, or other facilities:

Provided, That an employee who is compensated on a salary or fee basis at the rate of not less than $100 per week (exclusive of board, lodging, or other facilities), and whose primary duty consists of the performance of office or nonmanual field work directly related to management policies or general business operations of his employer or his employer's customers, which includes work requiring the exercise of discretion and independent judgment, shall be deemed to meet all of the requirements of this section."

In determining whether or not an employee is exempt under the provisions of the law now under con-

sideration, the tryer of the facts must look to the duties performed by the employee. The title given to an employee or the designation of his employment is of little assistance. *Walling v. General Industries Co.,* 155 F. (2d) 711, Affirmed 67 S. Ct. 883. *Walling v. Moore Milling Co.,* 62 F. Supp. 378.

It is, therefore, of little assistance to the Court to know that the appellant was employed as a "boiler and machinery inspector" (Tr. 12). To determine whether or not appellant was engaged in an exempt employment, the Court must first determine what work appellant, in fact, performed for appellee.

Appellee submits that this determination is simply one of fact. The trial judge found that appellant's primary duty consisted of the performance of office or nonmanual field work directly related to management policies or general business operations of the appellee or appellee's customers; that appellant customarily and regularly exercised discretion and independent judgment; that appellant performed his work under only general supervision and along specialized and technical lines requiring special training, experience and knowledge and that appellant executed special assignments and tasks under only general supervision (Tr. 20-22).

Appellant overlooks these facts in setting forth his contentions as to the evidence (App. Br. 7). However, these findings were amply supported by the testimony in the record.

It is, of course, well settled that in actions under the Fair Labor Standards Act, the same as in other cases,

the findings of the Judge below are binding upon appeal unless it can be said that they are clearly wrong. Rule 52 (a) of the Rules of Civil Procedure 28 U.S.C.A. following section 723 (c). An appellate court will not weigh the evidence or retry the issues of fact and substitute its judgment for that of the trial court. *Smith v. American Transit Lines, Inc.,* 163 F. (2d) 1014. *Atlantic Co. v. Weaver,* 150 F. (2d) 843. *Dumas, et al v. King,* 157 F. (2d) 463.

As the questions involved are largely fact questions, appellee submits that this appeal should be resolved on the basis of the above rule. However, in support of the trial court's findings, appellee will, at this point in its brief, discuss the evidence upon which the trial judge based his findings.

In order to obtain the position appellant held with appellee at the time in question, appellant was first required to secure a state license (Tr. 37). Before a license could be obtained appellant had to pass a two-day examination conducted by state examiners (Tr. 37). To be eligible for the examination an applicant had to be over twenty-one years of age (Tr. 37) and have either three years actual experience or an engineering degree plus two years actual experience (Tr. 37).

Appellant in addition to the above qualifications had been employed for over twenty years as a marine engineer (Tr. 39), had taken a two-years' correspondence course in refrigeration (Tr. 39), and had studied for approximately four years a correspondence course of the Coast Guard (Tr. 40).

Appellant as an employee of appellee was qualified to inspect all kinds of machinery of every description. This included not only factory machinery but such complicated devices as elevators, pressure vessels, boilers, electrical motors, etc. (Tr. 42-43). Appellant was qualified to and did enter large sawmills, paper mills, and similar establishments and inspect for safety all of the machinery used therein (Tr. 42).

In making these inspections, appellant was skilled in the use of and knew how to interpret various testing devices and instruments such as strain gauges (Tr. 43), tachometers (Tr. 44), vibrometers (Tr. 44), megohmeters (Tr. 44), volt and amp meters (Tr. 44), etc.

Although appellant on occasions used a hammer, this was not for purposes of doing repair or similar type work but was used to tap with so as to make a sound as a testing device (Tr. 43).

Appellant was not required to do physical (Tr. 48) or manual labor (Tr. 49). The physical labor connected with preparing the boilers, pressure vessels, and other objects for inspection was done by employees of the various assureds in advance of appellant's arrival (Tr. 48).

Appellant worked irregular hours and arranged his own schedule (Tr. 29). He was given a geographical territory to service and it was his responsibility to organize this territory and plan his work as he saw fit (Tr. 109, 52).

It was appellant's duty when he first called on an assured to consult with management. On a first inspec-

tion, before actually looking at the machinery, he had to make a general overall evalution of the plant (Tr. 53). He had to size up and evaluate the personnel available and judge their ability to properly operate the machines (Tr. 111). He had to inspect and evaluate the repair facilities and the maintenance program (Tr. 53). One of his principal responsibilties was to give instruction and advice and make recommendations concerning loss prevention (Tr. 54, 110). This encompassed not only changes in mechanical structure but personnel training as well (Tr. 110).

If the plant was deficient in some way in its maintenance program, repair facilities, training program, or other respect, appellant would make recommendations and suggestions for improvement (Tr. 54).

The inspections that appellant made included making inspections for the State of Oregon and submitting reports to the State (Tr. 55, 59).

Appellant's recommendations were sent to the insured. The great majority of the time appellant dealt directly with the insured in seeing that his recommendations were carried into effect. The appellant and not the Home Office followed up on these recommendations (Tr. 112).

If there was resistance or if the recommendations were not complied with, appellant was required to use diplomacy in his dealings with the assured (Tr. 61).

The appellant was sometimes required to consult with the agents and solicit their aid in carrying out his recommendations (Tr. 111). In addition he also made

underwriting recommendations (Tr. 110) and recommendations concerning agency and policy problems (Tr. 111). He was familiar with rates and would sometimes give the agents advice concerning rates (Tr. 65).

At the time in question there were six engineer inspectors for the entire State of Oregon (Tr. 87). When appellant first went to work for appellee, all of the inspectors were on the same level authoritywise (Tr. 88). Their immediate superior in Oregon was Mr. Bogardus, who had no knowledge or skill in engineering but acted only in the capacity of administrative head (Tr. 87).

The appellant did not operate under and was independent of direct supervision (Tr. 109). To a very large degree he depended on his own judgment and discretion in making decisions.

It can thus be seen that appellant was constantly required to exercise independent judgment and discretion and that he worked only under general supervision in specialized and technical lines requiring training, experience and knowledge.

As previously pointed out, the title given an employee or the designation of his employment is of little assistance in determining whether or not he is an administrative employee within the meaning of the exemption statute. The Courts have, however, on a number of occasions, dealt with the problem of whether or not inspectors of various kinds were exempt under the law now under consideration.

For example, in the case of *Ashworth v. E. B. Badger & Sons Co.,* 63 F. Supp. 710, it was held that a field

inspector-expediter was exempt under the regulation under consideration.

The employer in this case was engaged in the business of production, engineering and installation of equipment for oil refining plants, chemical plants, and power plants. Defendant had contracts with corporations and furnished plans for and parts of refining and power plants. To fill these contracts, subcontracts were made with other manufacturers. The other manufacturers fabricated the pipe and manufactured the component parts of the refining and power plants in question and it was with this portion of the defendant's work that the plaintiff was employed. To each plant an inspector-expediter was sent to represent the defendant and follow the order through its different stages of production to determine if plans and specifications were properly met. It also was the duty of this individual to try and speed up the job if it fell behind schedule. The Court held:

> "That the plaintiff's work was along specialized lines requiring special training, experience or knowledge can hardly be doubted. It may be noted that the Regulation does not demand that the work be along both specialized *and* technical lines. Although it would not be conclusive that the defendant itself regarded that the work required special training or experience, yet it is of considerable importance that the defendant required a substantial amount of specialized training before employing the plaintiff to perform the work involved, and there is no doubt the plaintiff had such training. The very nature of the work involved, as outlined above, indicates clearly the plaintiff's work was along specialized lines since it undoubtedly required special training, * * *"

" * * * Giving the words of the Regulation their natural meaning, an employee possessing the authority to make decisions on his own account without direction or instruction from others may be said to exercise 'discretion and independent judgment.' Under this test the plaintiff here undoubtedly performed work which required or involved the exercise of discretion and independent judgment. * * *"

"The contention of the plaintiff that his work was merely mechanical is not tenable. It was far more than mechanical; it involved, as stated above, the necessity to make decisions; it was administrative within the meaning of the Regulation. Employees serving in the plaintiff's capacity are more or less on their own in the field, doing important work for the purpose of enabling the defendant's business to function.

"The unsupported testimony of the plaintiff that he performed manual labor at times does not aid him. True, he performed some manual labor that was incident to his work but this court cannot find he performed the manual labor he stated he performed at the Bent and Hayward Street Shops of the defendant. Whatever work he was required to do at these shops involved the performance of the same duties he did in the field. It is of no moment he was not always busy with those duties at those shops in the last days of his employment with the defendant and he volunteered to do some manual work. Further, this court cannot find as a fact the plaintiff lifted heavy plates weighing up to 100 pounds at the Bent Street Shop. If he did, he did so on his own account since there were union employees at that shop to perform this work. His work did not require it. The plaintiff's work was essentially nonmanual in every sense of the word."

In the case of *Distelhorse v. Day and Zimmerman,* 58 F. Supp. 334, the Court held that an assistant safety

engineer was employed as an administrative employee. The Court held that he regularly and directly assisted the chief safety engineer in nonmanual work requiring the exercise of discretion and independent judgment.

In the case of *Baker v. California Shipbuilding Corporation,* 73 F. Supp. 322, the Court dealt with employees in several different categories. It was held, for example, that an employee who was an inspector in the steel shop but whose work merely required him to determine the quality of the material and its confirmation to specifications and whose duties were routine and involved little authority was covered by the Act. On the other hand, however, safety inspectors were held to be exempt. These latter employees were given a particular section of the plant to supervise and ascertain the safety conditions and methods under which the men worked. These men had no authority to order compliance with their recommendations, but their duties were nonmanual field work held to directly relate to management policies and general business operations and that required experience, discretion and independent judgment. They conducted conferences with leadmen and foremen relating to safety measures and preventable methods to avoid accidents. A supervisor and inspector in the engineering and inspection departments was also held to be an administrative employee.

Appellee submits that the appellant in the case at bar had considerably more independence and responsibility than did the inspectors in the Baker case.

See also *Wells v. Radio Corporation of America,* 77

F. Supp. 964, where Judge Medina had occasion to consider process engineers, manufacturing development engineers, time study engineers, cost estimators, problem analysts, foremen and assistant foremen. In all of these cases, it was held that the employees were exempt under the Wage and Hour Law.

In *Walling v. Armour & Co.,* 13 CCH Lab. Cas. 63,883, the Court held that a car-route beef selector whose duties involved assisting executive employees was engaged in an administrative capacity as was a timekeeper.

In *Kerew v. Emerson Radio and Phonograph Co.,* 76 F. Supp. 197, the Court held that an employee who had been engaged in the engineering department and who performed manual labor as a highly skilled mechanic was not exempt, but that when he was assigned as a fuel inspector with duties that involved independent judgment, he was exempt. As an employee of the latter class, he spot-checked, used gauges and was even engaged in some repair work, although this did not occupy very much of his time.

In *Conary v. A.O.G. Corp.,* 20 CCH Lab. Cas. 66,-353, field auditors, field materials men and inspectors were held to be exempt. These employees were required to read blueprints and engineering specifications; have knowledge of measuring instruments, gauges, etc., and know the use thereof; they were required to have knowledge of manuals and guides to follow as standards; they worked in the field and were under only general supervision.

Appellee relies heavily on the case of *Mitchell v. Hartford Steamboiler Inspection and Insurance Co.,* 28 CCH Lab. Cas. 69,192; 30 CCH Lab. Cas. 70,135; 235 F. (2d) 942. Appellee submits that this case is not an authority in support of appellant's position either on the facts or on the law announced therein.

In the Hartford case, supra, the plaintiff was the Secretary of Labor and brought the action apparently for the purpose of determining the validity of the labor contracts that the insurance company had entered into with its inspectors. The Court held in favor of the insurance company ruling that the contracts were valid. It is suggested that perhaps for this reason the Court did not feel it necessary to discuss or cite cases such as those already considered herein, when it discussed the administrative employee's exemption.

Even under the facts in that case, however, the Court did find that the inspectors customarily and regularly exercised discretion and independent judgment and that the inspectors performed their work under only generalized supervision and along specialized or technical lines requiring special training, experience and knowledge. However, the Court apparently did not classify the word as "nonmanual field work."

Irrespective of what kind of work the Court may have felt the Hartford inspectors were engaged in under the facts of that case, it is definitely clear under the facts in the case at bar that appellant was not engaged in "manual labor." In this case appellant worked in the field and by his own testimony was engaged in nonmanual work.

Even if appellant had occasionally performed some mechanical operations in connection with his work, this would not put him in a nonexempt category. *Anderson v. Federal Cartridge Corp.*, 62 F. Supp. 775, 783; Aff'd. 156 F. (2d) 681.

Furthermore, the record in the case at bar shows clearly that the work performed by the Hartford inspectors materially differs from the work performed by appellee's inspectors. It so happened that the witness McIntyre had previously been employed by the Hartford Steamboiler Inspection and Insurance Company (Tr. 117) and was intimately familiar with their procedures (Tr. 118). Mr. McIntyre explained that appellee's inspectors, as distinguished from those employed by the Hartford and some other companies, were expected to handle more complicated inspection work; that they did sales work of a limited degree; that they were much more independent and operated with much less supervision and direction (Tr. 120). Mr. McIntyre explained that appellee's inspectors had to make evaluations from the standpoint of an independent engineer and that this was not true of the Hartford inspectors (Tr. 124).

As pointed out in the Hartford case, supra, the Hartford inspectors worked under very close supervision by their superiors. They were required to fill out daily forms which were detailed and which were in turn reviewed by supervising inspectors before being sent to the insured. In the case at bar, as already pointed out, the inspector's recommendations were sent directly to

the assured without changes being made and without being passed on by a superior.

Also in the Hartford case, there was a supervising inspector having under his authority a small group of field inspectors. This was not true of appellee's operation.

It is clear from this testimony that appellee's inspectors exercised a great deal more independence and worked in the field under far less supervision than did the Hartford inspectors. Appellee submits that the cases it has previously cited herein are much more persuasive in its favor than is the Hartford case in appellant's favor.

Appellant cites the Administrator's Explanatory Bulletin (App. Br. 9-12) in support of his contentions. The Bulletin, appellee submits, is no more helpful than the regulation as it deals only in generalities. To see if the regulation is applicable, the facts involved in *this* case must be considered. It is significant that a labor board representative reviewed appellee's methods of handling its inspectors in 1953 and instructed appellee that inspectors in appellant's category were engaged in exempt work (Tr. 95). Appellee in considering appellant in an exempt group was simply following the labor board representative's instructions.

CONCLUSION

The decision in this case depends upon the determination of fact questions concerning appellant's employment. If, in fact, appellant performed work of the kind and description set forth in the regulation under consideration, he was in an exempt category. The trial judge found, as a matter of fact, that his work was exempt from the Wage and Hour Law. These findings are binding unless clearly erroneous.

Moreover, the record, including the testimony of appellant himself, clearly preponderates in favor of the appellant being classed as an administrative employee. Many decisions have held employees doing similar work but with far less independence and responsibility than appellant were exempt as administrative employees.

The trial court's findings and judgment to that effect should be affirmed.

Respectfully submitted,

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